Re Southern Investment Bank Bhd & Anor

HIGH COURT (KUALA LUMPUR) — EX PARTE ORIGINATING SUMMONS NO D1–24–451 OF 2008
MOHD HISHAMUDIN J
11 DECEMBER 2008

Banking — Banks and banking business — Transfer of business — Application to High Court — Whether Minister's decision to approve transfer could be communicated through Bank Negara Malaysia — Whether communication of decision to approve transfer could be delegated — Banking and Financial Institutions Act 1989 ss 49, 50 — Delegation of Powers Act 1956 s 17

Southern Investment Bank Bhd ('SIBB') and Hong Leong Investment Bank Bhd ('HLIB'), the two applicants in this ex parte summons application, had entered into a sale of business agreement with two other entities, CIMB Bank Bhd and HLG Capital Bhd. It was a term of this agreement that SIBB transfer its assets and liabilities to HLIB. Therefore the applicants had, by way of this application pursuant to s 50 of the Banking and Financial Institutions Act 1989 ('BAFIA'), applied for orders to transfer and vest the assets and liabilities of SIBB to HLIB. The boards of directors of both applicants had approved the transfer and vesting of the assets and liabilities of SIBB to HLIB. The application for the transfer of the business under s 50 of the BAFIA had to be made jointly by both institutions and to comply with s 49 of the BAFIA. Section 49(7) of the BAFIA required the proposal to transfer to be approved by the Minister of Finance ('Minister'). The applicants in their affidavits in support of their application claimed that the Minister had given his approval for the sale of the assets and liabilities through Bank Negara Malaysia ('BNM'). According to the applicants this approval was allegedly given in a letter jointly signed by an officer from the BNM and the Securities Commission and addressed to CIMB. The applicants, in reliance on s 49(8) of the BAFIA further submitted that since the Minister's decision to refuse the application was notified through BNM it followed that a decision to approve may also be notified through BNM.

Held, dismissing the application with liberty to file afresh:

(1) Under s 50 of the BAFIA, it is crucial for the applicants to show to the court that they had obtained the approval of the Minister pursuant to s 49(7) of the BAFIA. However, the applicants in the present case had

failed to do so but merely produced a letter jointly issued by BNM and the Securities Commission as evidence of the approval of the Minister. The contents of this letter did not satisfy the requirements of s 50 read with s 49(7). To prove that the Minister had given the requisite approval under s 49(7) of the BAFIA, the approval letter must either be signed by the Minister himself or be signed by an authorised officer on behalf of the Minister pursuant to s 17 of the Delegation of Powers Act 1956 ('the Act'). Further, since the Minister's approval was given pursuant to s 49(7) of the BAFIA, the approval letter must clearly state that the approval was given pursuant to an application by the applicants and upon considering the recommendation of BNM (see para 13).

(2) If the intention of BAFIA is that both refusal of approval and granting of approval decisions were to be communicated through BNM then the Act would have said so. However, since the Act is explicit that the Minister's decision to refuse approval must be made by BNM to the applicant but is silent as regards the mode of communication in a case where approval is granted, the implication is that the notification of approval cannot be communicated by BNM but must be made directly by the Minister himself or one delegated by the Minster pursuant to s 17 of the Act (see para 16).

[Bahasa Malaysia summary

Southern Investment Bank Bhd ('SIBB') dan Hong Leong Investment Bank Bhd ('HLIB'), dua pemohon dalam permohonan saman ex parte ini, telah menandatangani satu perjanjian jualan perniagaan dengan dua entiti yang lain, iaitu Bank CIMB dan HLG Capital Bhd. Adalah menjadi syarat perjanjian bahawa SIBB memindahkan aset dan tanggungannya kepada HLIB. Maka, pemohon-pemohon telah, berikutan dengan permohonan ini di bawah s 50 Akta Bank dan Institusi-Institusi Kewangan 1989 ('BAFIA'), memohon suatu perintah pemindahan dan perletakhakkan aset dan tanggungan SIBB kepada HLIB. Ahli lembaga pengarah kedua-dua pemohon meluluskan pemindahan dan perletakhakkan aset dan tanggungan SIBB kepada HLIB. Permohonan pemindahan perniagaan di bawah s 50 BAFIA perlu dibuat bersama oleh kedua-dua pihak dan untuk mematuhi peruntukan s 49 BAFIA. Seksyen 49(7) BAFIA mengkehendaki cadangan pemindahan diluluskan oleh Menteri Kewangan ('Menteri'). Dalam afidavit sokongan permohonan, pemohon-pemohon menyatakan bahawa Menteri telah meluluskan jualan aset dan tanggungan tersebut menerusi Bank Negara Malaysia ('BNM'). Menurut pemohon-pemohon, kelulusan tersebut dikatakan diberi melalui surat yang ditandatangani bersama oleh seorang pegawai daripada BNM dan Suruhanjaya Sekuriti dialamatkan kepada CIMB. Pemohon-pemohon, mengguna pakai s 49(8) BAFIA seterusnya menyatakan bahawa memandangkan keputusan oleh Menteri menolak

permohonan tersebut dimaklumkan menerusi BNM, maka keputusan meluluskan permohonan mungkin juga dimaklumkan menerusi BNM.

Diputuskan, menolak permohonan tetapi dengan kebebasan memfailkan semula:

(1) Di bawah s 50 BAFIA, adalah penting bagi pemohon-pemohon menunjukkan kepada mahkamah bahawa mereka telah memperoleh kelulusan daripada Menteri berikutan dengan s 49(7) BAFIA. Tetapi, pemohon-pemohon dalam kes ini gagal berbuat demikian, malah hanya menyerahkan surat yang dikeluarkan bersama oleh BNM dan Suruhanjaya Sekuriti sebagai bukti kelulusan daripada Menteri. Isi surat tersebut tidak menepati kehendak-kehendak s 50, dibaca bersama s 49(7). Untuk membuktikan bahawa Menteri telah memberikan kelulusan prasyarat di bawah s 49(7) BAFIA, surat kelulusan tersebut mestilah ditandatangani sama ada oleh Menteri itu sendiri atau pegawai berkenaan bagi pihak Menteri itu, berikutan dengan s 17 Akta Perwakilan Kuasa 1956 ('Akta tersebut'). Malah, memandangkan kelulusan daripada Menteri diberikan berikutan dengan s 49(7) BAFIA, surat kelulusan tersebut hendaklah dengan jelas menyatakan kelulusan itu diberikan berikutan permohonan oleh pemohon-pemohon dan setelah mempertimbangkan saranan daripada BNM (lihat perenggan 13).

(2) Jika maksud BAFIA adalah keputusan sama ada penolakan dan kelulusan dimaklumkan menerusi BNM, maka, Akta tersebut seharusnya menyatakan sedemikian. Tetapi, memandangkan Akta tersebut jelas menyatakan bahawa keputusan Menteri untuk menolak kelulusan mesti dibuat menerusi BNM kepada pemohon tetapi tidak menyatakan apa-apa tentang bagaimana harus memaklumi pemohon jika permohonan kelulusannya dibenarkan, kesannya adalah, notis kelulusan tidak boleh dibuat menerusi BNM tetapi mestilah dibuat terus oleh Menteri sendiri atau salah seorang wakil Menteri, berikutan dengan s 17 Akta tersebut (lihat perenggan 16).]

Notes

For cases on bank and banking business in general, see 1 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 1877–2022.

Legislation referred to

Banking and Financial Institutions Act 1989 ss 49, 49(7), (8), 50
Delegation of Powers Act 1956 s 17

LK Mak (Mimi Loke with him) (Kadir Andri & Partners) for the first applicant.
KK Chan (YM Lee with him) (Shook Lin & Bok) for the second applicant.

Mohd Hishamudin J:

[1] This ex parte originating summons is for an application pursuant to s 50 of the Banking and Financial Institutions Act 1989 ('BAFIA') for orders to transfer and vest the assets and liabilities of the first applicant, Southern Investment Bank Bhd ('SIBB' or 'transferor'), to the second applicant, Hong Leong Investment Bank Bhd ('HLIB' or 'transferee').

[2] Section 50 of the BAFIA provides:

> 50 Application to High Court to facilitate agreement or arrangement for transfer of whole or part of business of licensed institution being given effect to.
>
> (1) Where the Minister has granted his approval under section 49(7) to an application in respect of an agreement or arrangement under section 49(1) (b) or (c), the licensed institution whose business is to be transferred (hereinafter referred to as 'the transferor') and the licensed institution or other person to whom the transfer is to be made (hereinafter referred to as 'the transferee') may make a joint application to the High Court by way of an ex parte originating summons for such order of the Court as may be required by them to facilitate or enable the agreement or arrangement being given effect to, and in such application there may be sought all or any of the following orders: ...
>
> (2) On the hearing of an application under subsection (1), the High Court may grant an order in the terms applied for, or with such modifications or variations as the Court deems just or proper in the circumstances of the case.

[3] The above provisions of BAFIA provide that the application for the transfer of the business of a licensed institution to another person may be made jointly by both institutions by way of an ex parte originating summons to the High Court where the proposal to transfer has been approved by the Minister of Finance.

[4] The purpose of the application is to enable an agreement for the transfer of business to be facilitated and to be given effect to.

[5] Now, in the present case, the transferee is a company incorporated under the laws of Malaysia, and the transferor is a merchant bank duly licensed under BAFIA.

[6] Both the applicants and two other entities (CIMB Bank Bhd and HLG Capital Bhd) have entered into a sale of business agreement ('the sale of business agreement'). Pursuant to cl 3 of this agreement, SIBB is to transfer its assets and liabilities to HLIB.

[7] If this court were to grant the present application, the transfer and vesting of the assets and liabilities to HLIB is to be completed pursuant to the sale of business agreement on the date as specified in the order of this court.

[8] The boards of directors of both applicants have approved the transfer and vesting of the assets and liabilities of SIBB into HLIB.

[9] The approval of the Minister of Finance in respect of the agreement to transfer and to vest the assets and liabilities is required by s 49 of the BAFIA. This provision states as follows:

49 Sanction required for reconstruction, etc of licensed institutions

(1) No person shall enter into an agreement or arrangement

(a) which will result in a change in the control of a licensed institution or its holding company;

(b) for the sale, disposal, or transfer howsoever, of the whole or any part of the business of a licensed institution;

(c) for the amalgamation or merger of a licensed institution with any other person; or

(d) for the reconstruction of a licensed institution, unless —

(A) the proposed agreement or arrangement is in writing; and

(B) all the parties thereto have first made an application in writing to the Minister for his approval of such agreement or arrangement and have obtained the Minister's approval thereto.

(2) An application under subsection (1) shall be made by submitting it to the Bank together with a copy of the proposed agreement or arrangement and all other information and documents as may be related, directly or indirectly, to the agreement or arrangement or relevant to its consideration.

(3) At any time after receiving an application and before it is determined by the Minister, the Bank may, by written notice, require the applicants or any of them, or any person who is a director, controller or manager of any of the applicants, to provide any additional information or documents.

A (4) Where any additional information or document required under subsection (3) is not provided by any person from whom it is required within the time specified in the requirement or any extension thereof granted by the Bank, the application shall be deemed to be withdrawn and shall not be further proceeded with, B without prejudice to a fresh application being made by the applicants.

(5) The Bank shall, on an application having been duly made in accordance with the foregoing provisions of this section and after being provided with all such information and documents as it may C require, consider the application, and make a recommendation to the Minister whether the application shall be approved or refused and as to the modifications, variations or conditions, if any, subject to which it may be approved.

D (6) A recommendation to approve an application shall not be made if the Bank is satisfied that it would be detrimental to the soundness of the financial structure of Malaysia to do so.

(7) Upon receiving an application and the recommendation of the Bank under this section, the Minister may approve the application with or E without any modifications, variations or conditions, or refuse the application.

(8) Where the Minister refuses an application, the Bank shall notify the applicants in writing of the refusal.

F (90) An application under —

(a) subsection (1)(b) shall not be recommended by the Bank for approval and shall not be approved by the Minister where the agreement or arrangement would result in the sale, disposal, or G transfer howsoever, of any part of the business of the licensed institution to any person which is not a licensed institution, except in relation to a part of the business, being a part which does not require to be licensed under this Act; and

H (b) subsection (1)(c) shall not be recommended by the Bank for approval and shall not be approved by the Minister except in the case of an amalgamation or merger with another licensed institution.

I (9A) Subsection (9) shall not apply to any agreement or arrangement carried out by any person pursuant to the Malaysia Deposit Insurance Corporation Act 2005.

(10) In this section, 'business' has the meaning assigned to it in section 50(8).

[10] It is claimed by the affidavits of the applicants that the Minister of Finance has, through Bank Negara Malaysia ('BNM'), given his approval for the sale of the assets and liabilities via a letter dated 14 May 2008 issued jointly by BNM and the Securities Commission ('the SC'). The letter is signed jointly by the following two officers, one from Bank Negara and the other from the Securities Commission, namely:

(1) Puan Nor Shamsiah Yunus, Assistant Governor, Bank Negara Malaysia; and

(2) Encik Ranjit Singh, Managing Director, Securities Commission Malaysia.

[11] The letter mentioned above is exhibited by the affidavits. The letter is addressed to the Director of Corporate Finance, CIMB Investment Bank Bhd. It is not clear from the affidavits as to why the alleged approval letter is addressed to CIMB Investment Bank Bhd and not to the two applicants in the present originating summons. Anyway, the letter reads:

No. Rujukan: 2201/134/3/2/CKY/MK1/MSB

MSD/ISD/IB/CORR(5)08

14 Mei 2008

Encik Ho Tat Heng

Pengarah

Kewangan Korporat

CIMB Investment Bank Berhad

Tingkat 10, Bangunan CIMB

Jalan Semantan

Damansara Heights

50490 Kuala Lumpur

Tuan,

Cadangan Pelupusan Aset dan Liabiliti Terpilih Southern Investment Bank Berhad kepada HLG Credit Sdn Bhd

Kami merujuk kepada permohonan-permohonan yang dikemukakan oleh Kumpulan CIMB dan Kumpulan Hong Leong mengenai perkara di atas.

2. Kami ingin memaklumkan bahawa Y.B. Menteri Kewangan II telah meluluskan cadangan pemberian lesen bank saudagar kepada HLG Credit Sdn Bhd (HLG Credit) *dengan syarat* Southern Investment Bank Berhad (Southern Investment) menyerah balik lesen bank saudagar yang dimilikinya kepada Bank Negara Malaysia sebaik sahaja cadangan pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment selesai dilaksanakan.

3. Sehubungan ini, Y.B. Menteri Kewangan II bersetuju untuk memberi kelulusan-kelulusan berikut:

(i) Kelulusan di bawah Seksyen 49(7) ABIK bagi Kumpulan CIMB dan Kumpulan Hong Leong memeterai perjanjian atau perkiraan bagi pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment; dan

(ii) Kelulusan di bawah Seksyen 139(1) Akta Pasaran Modal dan Perkhidmatan 2007 (CMSA) untuk pelupusan kepentingan ekuiti dalam SBB Securities Sdn Bhd daripada SBB Capital Market Sdn Bhd kepada HLG Credit.

4. Cadangan penubuhan bank pelaburan 'Hong Leong Investment Bank Berhad' juga telah diluluskan di bawah Garis Panduan Mengenai Perolehan Kepentingan, Penggabungan dan Pengambilalihan oleh Kepentingan Tempatan dan Asing.

5. Berikutan penyerahan balik lesen bank saudagar milik Southern Investment kepada Bank Negara Malaysia sebaik sahaja cadangan pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment selesai dilaksanakan, Y.B. Menteri Kewangan II turut bersetuju memberi kelulusan di bawah Seksyen 15(1) ABIK untuk membolehkan Southern Investment, yang bukan lagi merupakan sebuah bank saudagar berlesen, menggunakan perkataan 'bank' pada namanya 'Southern Investment Bank Berhad' untuk tempoh setahun dari tarikh surat ini bagi menyelesaikan hal-hal dokumentasi.

Sekian, terima kasih.

Yang benar,	Yang benar,
Sgd.	Sgd.
(Nor Shamsiah Yunus)	(Ranjit Ajit Singh)
Penolong Gabenor	Pengarah Urusan
Bank Negara Malaysia	Suruhanjaya Sekuriti Malaysia

I have dismissed the application. In my view, in the light of the provisions of s 50 of the BAFIA, it is crucial for the applicants to show to the court that the approval of the Minister of Finance pursuant to s 49(7) of the BAFIA has been obtained. This the applicants in the present case have failed to do. The applicants have merely shown to this court the letter issued jointly by Bank Negara and the Securities Commission. But the letter merely says:

3 Sehubungan ini, Y.B. Menteri Kewangan II bersetuju untuk memberi kelulusan-kelulusan berikut:

Kelulusan di bawah Seksyen 49(7) ABIK bagi Kumpulan CIMB dan Kumpulan Hong Leong memeterai perjanjian atau perkiraan bagi pelupusan dan pemerolehan aset dan liabiliti terpilih Southern Investment;

[12] The above statement merely states that the approval of the Minister of Finance has been given pursuant to s 49(7) of the BAFIA to the CIMB Group and the Hong Leong Group to enter into an agreement or arrangement for the disposal and acquisition of selected assets and liabilities of Southern Investment. To my mind, the content of the letter does not satisfy the requirements of s 50 read with s 49(7). In my judgment, for this court to be fully satisfied that the requisite approval under s 49(7) has indeed be given by the Minister of Finance, it is essential for the applicants to exhibit either an approval letter signed by the Minister of Finance himself, or an approval letter signed by an authorised officer on behalf of the Minister of Finance pursuant to s 17 of the Delegation of Powers Act 1956. And further, since the Minister's approval is given pursuant to s 49(7) of the BAFIA, the approval letter must clearly states that the approval is given pursuant to an application by the applicants and upon considering the recommendation of Bank Negara.

[13] There is no suggestion by the applicants in the present case that the two officers/signatories whom I have named above, when they jointly signed the letter, were acting pursuant s 17 of the Delegation of Powers Act. Nonetheless, perhaps it might be of some interest if I were to set out in this judgment the provisions of s 17 of the said Act. That section reads:

> Signification of orders, etc., of, and signing of documents by, a Minister or Chief Minister.
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> 17 (1) Where by any written law power is given to a Minister or the Chief Minister of a State to make any regulation or order or give any direction, approval, permission or consent, or where any document is required to be under the hand of, or signed or countersigned by, such Minister, Chief Minister it shall be sufficient, unless it is otherwise expressed, for such regulation, order, direction, approval, permission, consent or document to be signified under the hand of, or signed or countersigned by, any officer under the administrative control or direction of such Minister or Chief Minister as the case may be and expressly or impliedly authorized by him by name or office in that behalf or in the case of a Minister under the hand of or signed or countersigned by a Deputy Minister.
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> (2) A certificate in writing purporting to be under the hand of the Minister or Chief Minister personally that any person was at the material date an officer under his administrative control or that any such officer was expressly or impliedly authorized by him to signify, sign or countersign a certain regulation, order, direction, approval, permission, consent or document shall be conclusive evidence of the facts stated in such certificate.
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> Where any such regulation, order, direction, approval, permission,

A consent or document has been signified, signed or countersigned by any officer not authorized in that behalf the Minister or Chief Minister concerned as the case may be may ratify such signification, signature or countersignature and thereupon the same shall have effect as if at the date on which such signification, signature or
B countersignature was effected or affixed by such officer he had been duly authorized thereto.

[14] Learned counsel for the applicants in their joint written submission
C submit that it is not necessary for the Minister to personally communicate his approval to the applicants. They refer to s 49(8) of the BAFIA that states:

> (8) Where the Minister refuses an application, the Bank shall notify the applicants in writing of the refusal.

D

[15] They argued that since the Minister's decision to refuse the application is notified through Bank Negara, it follows therefore that a decision to approve must also be notified through Bank Negara. With respect, I am unable to accept such an argument. In my opinion, if the intention of the Act
E is that both 'refusal of approval' and 'granting of approval' decisions were to be communicated through Bank Negara then the Act would have said so. On the contrary, I am inclined to the view that since the Act is explicit that the communication of the Minister's decision to refuse approval must be made (in writing) by Bank Negara to the applicant, but is silent as regard to the
F mode of communication in a case of where approval is granted, the implication is that in a case where approval is granted the notification cannot be communicated by Bank Negara but must be made either directly by the Minister himself or by a delegated officer on behalf of the Minister pursuant to s 17 of the Delegation of Powers Act.

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Application dismissed with liberty to file afresh.

Reported by K Nesan

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